15

(2)

No. 08-666

Supreme Court, U.S.
FILED
DEC 22 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SEAN QUINN,

Petitioner,

v.

STATE OF NEW JERSEY

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Robert A. Bianchi, Esq.
Prosecutor

John K. McNamara, Jr., Esq.*
Assistant Prosecutor
Counsel of Record*
Morris County Prosecutor's
Office, 8 Court Street
Morristown, New Jersey 07960
(973) 285-6200

QUESTION PRESENTED

1. Did the police violate due process by failing to videotape a field sobriety test administered as part of a driving while intoxicated investigation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL PROVISION INVOLVED.....2

STATUTORY PROVISIONS.....2

PROCEDURAL HISTORY 4

COUNTER STATEMENT OF FACTS.....6

REASONS FOR DENYING THE PETITION.....11

I. DUE PROCESS DOES NOT REQUIRE THE VIDEO-TAPING OF FIELD SOBRIETY TESTS

CONCLUSION.....16

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. Youngblood
488 U.S. 51 (1988).....11

California v. Trombetta
467 U.S. 479 (1984).....12

Dickerson v. United States
530 U.S. 428 (2000).....11

Greene v. Com.
244 S.W.3rd 128,131 (Ky. App. 2008).....14

Miranda v. Arizona
384 U.S. 436 (1996).....9 fn

State v. Cook
179 N.J. 533, 847 A.2d 530 (2007).....15

State v. State v. Delgado
188 N.J. 48, 902 A.2 888 (2006).....13

State v. Doriguzzi
334 N.J. Super. 530,
760 A.2d 336 (2000).....8 fn

State v. Gordon
261 N.J. Super. 464, 619 A.2d 259
(App. Div. 1993).....13

State v. Havatone
159 Ariz. 597, 600
769 P.2d 1043, 1046
(Ariz. App. 1989).....14

State v. Lyons
812 S.W.2d 336
(Tex. Ct. Crim. App. 1991).....14

State v. Nemesh
228 N.J. Super. 597, 550 A.2d 757
(App. Div. 1988)
certif.. den.114 N.J. 473, 555 A.2d 600
(1989).....14

State v. Powers
555 So.2d 888, 890-892
(Fla. App. 2 Dist. 1990).....14

State v. Scales
518 N.W.2d 587 (Minn. 1994).....15

Stephan v. State
711 P.2d 1156 (Alaska 1985).....15

Swanson v. Juneau
784 P.2d 678, 680-681
(Alaska App. 1989).....14

Statutes:

N.J.S.A. 39:3-76.2f.....4

N.J.S.A. 39:4-50.....2

N.J.S.A. 39:4-88b.....4

N.J.S.A. 39:4-96.....4

N.J.S.A. 39:8-1.....4

Rules:

New Jersey Court Rule 3:23-8.....3

OPINIONS BELOW

The May 2, 2008 opinion of the New Jersey Superior Court, Appellate Division is unreported but it is available at 2008 WL 1913041 (N.J. Super. App. Div.) (Pa1-3). The New Jersey Supreme Court denied Certification on July 3, 2008. State v. Quinn, 196 N.J. 343, 953 A.2d 762 (2008).

STATEMENT OF JURISDICTION

The judgment of the New Jersey Superior Court, Appellate Division was entered on May 2, 2008. (Pa1-2). The New Jersey Supreme Court denied the Petition for Certification on July 30, 2008. On September 26, 2008, the Petition for Certiorari was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS

N.J.S.A. 39:4-50 reads in pertinent part:

> (a)... a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.8% or more by weight of alcohol in the defendant's blood ... shall be subject:
> (2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to

> perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years... For a second violation, a person also shall be required to install an ignition interlock device under the provisions of P.L.1999, c. 417 (C.39:4-50.16 et al.) or shall have his registration plates revoked for two years under the provisions of subsection 2 or P.L.1995, c. 286 (C.39:3-40.1).

New Jersey Court Rule 3:23-8 reads, in pertinent part, as follows:

> "...In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of the defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury...."

PROCEDURAL HISTORY

On March 3, 2006, petitioner Sean Quinn was charged in Butler Township, New Jersey, with driving under the influence of alcohol, in violation of N.J.S.A. 39:4-50; reckless driving, in violation of N.J.S.A. 39:4-96; failure to maintain lane, in violation of N.J.S.A. 39:4-88b; failure to wear a seatbelt, in violation of N.J.S.A. 39:3-76.2f; and failure to inspect, in violation of N.J.S.A. 39:8-1. A bench trial was held in the Municipal Court of the Boro of Butler before the Honorable

George A. Cluff, J.M.C. on September 6 and October 4, 2006[1]. Petitioner was found guilty of driving under the influence. He received a two-year license revocation and fines. The remainder of his charges were dismissed pursuant to merger. (2T75-13-15). This sentence was stayed pending appeal to the Superior Court, Law Division. (2T75:19). Petitioner appealed as of right to the Law Division. On January 6, 2007, the municipal appeal was heard before the Honorable Salem V. Ahto, J.S.C. On de novo review, Judge Ahto affirmed the conviction. R. 3:23-8. An appeal was filed. On May 2, 2008, the New Jersey Superior Court, Appellate Division, affirmed Judge Ahto's decision. State v. Sean Quinn , App. Div. Dkt. No. A-

---

[1] 1T refers to the Municipal Court transcript of September 6, 2006

2T refers to the Municipal Court transcript of October 4, 2006.

3T refers to the Superior Court transcript of January 26, 2007.

3095-06T5. The New Jersey Supreme Court denied a Petition for Certification on July 3, 2008. State v. Quinn, 196 N.J. 343, 953 A.2d 762 (2008). This Petition for a Writ of Certiorari follows.

COUNTER STATEMENT OF FACTS

On March 3, 2006, at approximately 12:11 a.m., Officer Keith Soules[2], a twelve-year veteran of the Butler Police Department, was on patrol in an unmarked unit on Route 23 North in Butler, New Jersey. (1T13:7 to 1T14:20). He observed a white Mazda vehicle. His attention was drawn to the vehicle because the driver threw something out of the sunroof. (1T16: 2-5). Officer Soules followed the vehicle for about three quarters of a mile. (1T17:13-19). During that time, he observed the vehicle crossing over the dotted white lines in the road over ten (10) times. He also observed

---

[2] The trial transcript refers to Officer Soules, phonetically, as Officer 'Zulis'.

the vehicle switch lanes without signaling. (1T18:16-22; 1T19:16-22; 1T20:19-23). The officer was concerned that the driver of the vehicle was possibly intoxicated. (1T20: 2-5).

Officer Soules pulled up alongside of the vehicle and observed that the driver was not wearing a seatbelt. (1T21: 13-20). He executed a motor vehicle stop. (1T22:14-24). As the vehicle pulled to the side of the road, the officer observed it again crossing over the dotted and solid white lines. (1T23: 2-8).

Officer Soules exited his patrol car and approached the driver. He detected a strong odor of alcohol on the driver's breath. (1T24:5-9). He also observed that the driver had a hard time speaking and was slurring and stuttering. (1T24:22 to 1T25:3). The driver was later identified as Sean Quinn (hereinafter 'defendant'). (1T26:8-11).

Officer Soules asked defendant for his credentials. Defendant had a hard time locating his driving credentials. (1T25:17-20). After further observing the defendant's eyes to be bloodshot, and still noting a strong

odor of alcohol on his breath, Officer Soules determined that defendant had been drinking. (1T27: 6-10). Officer Soules testified that he asked defendant if he had been drinking. Defendant replied that he had not. (1T27: 11-17).

A short time later, Sgt. Chimento[3] of the Butler police department, arrived. (1T27: 18-19). In Officer Soules' presence, Sgt. Chimento asked defendant to exit his vehicle. Defendant did so by grabbing onto the door and roof of his car for support. (1T29:3-8). Sgt. Chimento asked defendant to perform some field sobriety tests. The first test Sgt. Chimento asked defendant to perform was the HGN test[4]. (1T31: 14 to T32: 7). Officer Soules was present and observed defendant perform this test. (1T32:

---

[3] Sgt. Chimento's testimony was stricken due to a sequestration violation. (2T69:24 to 2T71:8). At the trial de novo, the State relied solely on the testimony of Officer Soules. (3T6:13 to 3T7:4).

[4] Horizontal Gaze Nystagmus test. Under New Jersey law HGN results are not admissible. State v. Doriguzzi, 334 N.J.Super. 530, 760 A.2d 336 (App. Div. 2000).

4-10). During the HGN test, Officer Soules observed defendant to be having a "hard time, swaying back and forth, he was moving in circles. He kept reaching to grab for something for support." (1T36:3-5).

The next test administered by Sgt. Chimento was the alphabet test. Officer Soules observed that defendant had a hard time speaking during the alphabet test and that he stopped a couple of times. (1T32: 11-19). He testified that he observed defendant stop at the letters 'P' and 'W' and that he was stuttering and slurring the whole time. (1T34:9-15). Officer Soules then indicated that the defendant was having a hard time standing. The sobriety tests were discontinued for defendant's safety. (1T35:20-24).

Defendant was subsequently arrested, informed of his Miranda[5] rights and transported back to headquarters. (1T36:6-9). Once at headquarters, defendant admitted he had been drinking alcohol. He

---

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

told Officer Soules he had just returned from a business trip and had been drinking on the plane. (1T38:7-14). During this conversation, the defendant was stuttering and slurring his words. He became antagonistic, and called the officers pejorative names. (1T39:4-7; 1T40: 18-20). He also had a "hard time" every time he stood up and had difficulty following orders. (1T40: 14-17).

Officer Soules ultimately testified that in his opinion, defendant was "very intoxicated", and that his intoxication interfered with his ability to operate a motor vehicle. (1T43: 8-16).

REASONS FOR DENYING THE PETITION

I.

DUE PROCESS DOES NOT REQUIRE THE VIDEOTAPING OF FIELD SOBRIETY TESTS ON MOTOR VEHICLE OFFENSES.

Defendant argues that the field sobriety tests and/or evidence of defendant's behavior should be stricken from the record because they were not videotaped. Defendant claims this is a violation of his Fourteenth Amendment right to due process. The State disagrees as there is no federal due process requirement to videotape field sobriety tests.

The federal courts intervene only to correct wrongs of federal constitutional dimension. Dickerson v. United States, 530 U.S. 428, 438-439 (2000). This is not the case here.

There is no absolute duty to retain and preserve all items that might be of conceivable evidentiary value. Arizona v.

Youngblood, 488 U.S. 51, 58 (1988). Whatever duty the Constitution imposes on the states to preserve evidence is limited to material items. California v. Trombetta, 467 U.S. 479, 488 (1984). The failure to preserve potentially useful evidence violates due process only if the accused shows the police acted in bad faith. Youngblood, 488 U.S. at 56. This requires that the exculpatory value of the evidence be apparent and that the police know of it before they destroy an item. Id., at 56 fn.

This court has held that due process does not require that the police create evidence through the use of any particular investigative technique. Youngblood, 488 U.S. at 58-59 . Unless the defendant can show bad faith on the part of law enforcement, "the failure to preserve potentially useful evidence does not constitute a denial of due process of law". Id. at 58.

New Jersey courts have followed this court's precedent regarding the extent that

due process requires the preservation of evidence. For example, although New Jersey may require the recordation of evidence in some instances as a matter of State law, there is no due process requirement to create evidence. State v. Delgado, 188 N.J. 48, 63 , 902 A.2d 888, 896 (2006).

At the State level, the very issue Petitioner raises, was rejected by State v. Gordon, 261 N.J.Super. 464, 619 A.2d 259 (App. Div. 1993). In Gordon, the Randolph, N.J. police department had discontinued their previous practice of videotaping suspected drunk drivers. Defendant argued that this violated his right to due process. The Court disagreed. The Court held that the discontinued practice did not violate defendant's right to due process and that the police, acting in good faith, had no duty to create evidence by videotaping suspected drunk drivers. Id. at 464-465.

Every state court to consider the issue has rejected the premise that due process requires the police to record field sobriety

tests. *See e.g.*, Greene v. Com., 244 S.W.3d. 128, 131 (Ky. App. 2008); Swanson v. Juneau, 784 P.2d. 678, 680-681 (Alaska App. 1989); State v. Powers, 555 So.2d. 888, 890-892 (Fla. App. 2 Dist. 1990), *review denied* 563 So.2d 633 (1990); State v. Havatone, 159 Ariz. 597, 600, 769 P.2d. 1043, 1046 (Ariz. App. 1989); State v. Lyons, 812 S.W.2d. 336 (Tex. Ct. Crim. App. 1991).

Here, Officer Soules was able to testify as to his own observations of defendant's tests and behaviors. A videotape is "merely a mechanical reproduction of the observations made by the individuals who witnessed the actions of defendant at the time of videotaping..." State v. Nemesh, 228 N.J. Super. 597, 550 A.2d 757 (App. Div. 1988), certif. den., 114 N.J. 473 (1989).

The defendant has failed to show that the failure of the police to videotape him was caused by bad faith or that he was prejudiced by the lack of a videotape. Therefore, even if a video were required as a matter of State

evidentiary law, the defendant would not be entitled to relief under Youngblood.

Defendant's reliance on state law precedent is misplaced. Those cases pertain to custodial interrogations, and were decided on independent State law grounds. Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn. 1994); State v. Cook, 179 N.J. 533, 562, 847 A.2d 530, 546 (2004).

No special reasons exist for certiorari. The instant decision is not reported. It does not conflict with any decision from this Court. The issues here are fact specific, and are not of such a far-reaching nature that this Court should become involved.

Petitioner's allegations of due process violations are, in essence, an entreaty to this Court to re-visit and to reverse factual determinations made by the state courts. As such, no further review is warranted.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully submits that defendant's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. BIANCHI, ESQ.
MORRIS COUNTY
PROSECUTOR

December 19, 2008

By: JOHN K. McNAMARA, JR., ESQ.
ASSISTANT PROSEUCTOR
COUNSEL OF RECORD

Erin Smith Wisloff, Esq.
John K. McNamara, Jr., Esq.
On the brief